



# United States Department of the Interior

## FISH AND WILDLIFE SERVICE

Division of Ecological Services

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In Reply Refer to:  
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May 15, 2019

### Memorandum

To: Assistant Regional Director – Ecological Services, Southwest Region,  
Albuquerque, New Mexico (Attn: Marty Tuegel)

From: *Acting* Field Supervisor, Oklahoma Ecological Services Field Office, Tulsa, Oklahoma *Ken Collins*

Subject: Findings and Recommendations on Approval of the Amended American Burying  
Beetle Oil and Gas Industry Conservation Plan

### I. DESCRIPTION OF PROPOSAL

The U.S. Fish and Wildlife Service (Service) approved the Oil and Gas Industry Conservation Plan (ICP) pursuant to section 10(a)(1)(B) of the Endangered Species Act, as amended (16 USC § 1531-1544, ESA) on May 21, 2014. The approved ICP (2014 ICP) was available for issuance of Incidental Take Permits (permit) for a period of 2 years and authorized incidental take of the endangered American burying beetle (*Nicrophorus americanus*, ABB, Covered Species) through impacts to habitat, not to exceed a cumulative total from all permits under the ICP of 32,234 acres, for applicable oil and gas projects. Incidental take associated with construction of oil and gas projects could be permitted until May 20, 2016, while incidental take associated operation and maintenance activities could be permitted for up to 20 years. An amendment to the ICP was completed in 2016. The 2016 amendment extended the ICP sign-up period, the period for submission of Individual Project Plans (IPPs), and the project construction period by 3 years.

The current amendment to the ICP (2019 ICP) will extend the ICP sign-up period, submission of IPPs period, and the project construction period by an additional 5 years. All incidental take coverage provided by the 2019 ICP will end when any permits issued expire on May 20, 2039, regardless of when permits are issued or IPPs are approved. These are the only changes proposed for the 2019 ICP.

The 2019 ICP does not change the covered species, the covered area, the total take allowable (cumulatively 32,234 acres of suitable ABB habitat), the mitigation requirements, or the funding requirements. Each applicant must meet issuance criteria for a permit, submit and get approval for individual projects, and fulfill mitigation requirements prior to conducting any activity that

may result in take of ABB. If an applicant's activities may result in take of a listed, non-covered species, the applicant must seek take authorization for that take outside of the 2019 ICP.

The May 16, 2019, Final Environmental Assessment (2019 EA) was prepared in compliance with the Service's National Environmental Policy Act (NEPA) policy and analyzes the effects of the proposed action and the no action alternative on the human environment.

The 2019 ICP was developed by the Service as the Proposed Alternative. This alternative would allow for potential continued issuance of multiple permits while approving one conservation plan that would minimize and offset the potential impacts to the Covered Species by providing for on-site and off-site conservation measures that would be used to better manage the conservation of this species.

### Analysis of Effects

The effects of implementing the 2014 ICP on the ABB and the other species named above are fully analyzed in the Final Environmental Assessment for the 2014 ICP (2014 EA) and the biological opinion issued with the 2014 ICP, which are incorporated herein by reference. Direct effects from implementation of the 2014 ICP on ABBs include mortality or injury to adults, larvae, or eggs from crushing and collision, habitat removal, and/or fragmentation. Indirect effects on ABBs from implementation of the 2014 ICP could occur in the form of an increased presence of predators and competitors for carrion. Impacts specific to the 2019 ICP were analyzed in the final 2019 EA.

As in the 2014 ICP, before issuing a permit to an Applicant, the Service must find that the Applicant will minimize and mitigate the impacts of such taking to the maximum extent practicable under the 2019 ICP. The measures described in Section 4.2.2.2 of the 2019 ICP are intended to minimize and mitigate those impacts that cannot be avoided. Minimization and mitigation measures are required for Covered Activities occurring in suitable ABB habitat where ABBs are assumed or documented through a valid survey. Minimization and mitigation measures are not required for activities occurring in areas unfavorable for the ABB or within the effective area of a valid negative survey, as take is not expected in these areas.

Following permit issuance, Permittees will continue to be required to submit Individual Project Packages (IPPs) and must have Service approval prior to the initiation of Covered Activities within occupied ABB habitat. Further requirements for permit issuance and IPP approval is described in Section 7.0 of the 2019 ICP.

## II. PUBLIC COMMENT

A Notice of Availability of the draft EA and 2019 ICP was published in the *Federal Register* on March 14, 2019 (84 FR 9371). The public comment period ended on April 15, 2019. We received one comment during the 30-day public comment period which was not substantive. We made no changes to the final 2019 EA.

### III. INCIDENTAL TAKE PERMIT CRITERIA - ANALYSIS AND FINDINGS

1. The proposed taking will be incidental to otherwise lawful activities

The proposed exploration, construction, operation, maintenance, and decommissioning of well pads, pipelines, and associated infrastructure will be certified by the Applicants as otherwise lawful activities prior to permit issuance. The associated take will be incidental to and not the purpose of these activities.

2. The Applicant will, to the maximum extent practicable, minimize and mitigate for the impacts of such taking.

Applicants will agree to minimize impacts that may result in take of ABBs, including reducing motor vehicle, machinery, or heavy equipment use, risk of motor vehicles sparking wildfire, risk of erosion and to increase soil stability, use of artificial lighting, use of gas flares, disturbance from mechanical vegetation maintenance, and herbicide use. In addition, Applicants will provide an educational program for construction personnel and promote safety during operation fluid (fuels and lubricants) use and storage. Applicants will also set topsoils aside for use during restoration following construction.

Applicants will agree to mitigate for temporary, permanent cover change, and permanent impacts to ABBs (see table below).

	AREAS OF IMPACT		
IMPACT PERIOD/TYPE	ABB RANGE (BUT NOT WITHIN CPA)	CONSERVATION PRIORITY AREA	MITIGATION LAND
TEMPORARY	1:0.25	1:0.5	1:1.5*
PERMANENT COVER CHANGE	1:0.5	1:1	1:2*
PERMANENT	1:1	1:2	1:3*
*MITIGATION LAND RATIO IS EQUAL TO THE CPA RATIO PLUS THE MITIGATION ACRE(S) LOST.			

Based on the above mitigation ratios, the Service anticipates conserving, in perpetuity, between 0.04 (8,059 acres) and 0.32 (64,468 acres) percent of the ABB habitat in the Planning Area (19,612,333 acres), assuming full use of authorized take described in Section 3.3.4 of the 2014 ICP. Additionally, Permittees will minimize impacts and restore areas with temporary or permanent cover change impacts within 5 years of the impact start date.

The ABB mortality that occurs as a result of ICP implementation would constitute a short-term effect to the populations in Oklahoma, which would have minimal impact on the species as a whole, and the mitigation is anticipated to provide secure areas for ABB and mitigate for these short-term effects.

3. The proposed taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.

The 2014 ICP was reviewed by the Service under section 7 of the Act. In our biological opinion, dated May 20, 2014, which is incorporated herein by reference, the Service concluded that issuance of permits to Applicants, for a cumulative total from all permits under the ICP of 32,234 acres (approximately 0.16 percent of the 19,612,333 acres [7,936,830 hectares] of suitable ABB habitat within the Planning Area), would not likely jeopardize the continued existence of the ABB in the wild.

4. The Applicant has met other requirements imposed by the Secretary of the Interior, such as monitoring and reporting.

The Permittees or their successors will submit annual reports to the Service by March 1st of each year their permit is in effect that will allow the Service to adequately monitor the implementation of the minimization and mitigation practices described in the ICP. Annual reports will be submitted by the Permittees to the local and regional offices of the Service by the reporting deadline. Additionally, Permittees with temporary or permanent cover change impacts will report on the status of their restoration efforts annually and submit a restoration report within 5 years of the impact start date. If restoration is not successful, Permittees will increase their off-site mitigation from temporary or permanent cover change to the appropriate permanent mitigation ratio.

The ICP incorporates all elements determined by the Service to be necessary for approval of the ICP and issuance of the permits.

5. The Secretary of the Interior has received assurances that the plan will be implemented.

Permittees will provide funding for the acquisition of mitigation credits or mitigation lands to the Service for approval with IPPs (prior to impacts). Additionally, the Service has identified and described within Section 6.0 of the 2014 ICP six methods that Permittees may utilize to demonstrate funding assurances for full implementation of the ICP, including implementation of changed circumstances and restoration of areas with temporary or permanent cover change. These options include a financial test and corporate guarantee, a letter of credit, trust fund, surety bond, performance bond, and insurance. Permittees will provide funding assurances prior to IPP approval by the Service. Permittees have funded the ICP since its inception in 2014.

6. Alternatives.

**No Action Alternative.** The No Action alternative would be to not approve the 2019 ICP. When the current ICP expires, Industry would have to seek other methods to comply with the ESA. If their activities would result in take that could not be avoided and a Federal nexus exists (funded, authorized, or carried out by a Federal agency), an operator or individual may receive take coverage through consultation and a biological opinion issued by the Service to the Federal action agency. If no Federal involvement exists, applicants or individuals could develop an HCP



and apply for incidental take authorization from the Service on a project-by-project basis. Each application would require independent evaluation under NEPA.

**Proposed Alternative.** The proposed action is approval of the 2019 ICP, subsequent issuance of incidental take permits for covered species within the 25-year total term of the amended ICP, and implementation of the 2019 ICP as proposed. The changes to the original ICP include extending the ICP sign-up period, submission of Individual Project Plans (IPPs) period, and the project construction period by 5 years.

All incidental take coverage provided by the ICP will end when the permit expires on May 20, 2039, regardless of when permits are issued or IPPs are approved.

For a complete description of the covered activities, see Section 2 of the 2014 ICP on the Service's website at [www.fws.gov/southwest/es/oklahoma/ABBICP](http://www.fws.gov/southwest/es/oklahoma/ABBICP).

#### IV. GENERAL CRITERIA AND DISQUALIFYING FACTORS - ANALYSIS AND FINDINGS

The Service has no evidence that the 2019 ICP should be denied on the basis of the criteria and conditions set forth in 50 CFR 13.21(b)-(c). If an Applicant meets the criteria for the issuance of a permit and does not have any disqualifying factors that would prevent a permit from being issued under current regulations, the Service may issue a permit under the ICP following public notice in the *Federal Register*. Permittees will be required to submit IPPs for Service approval prior to the initiation of Covered Activities within occupied ABB habitat.

V. RECOMMENDATION ON PERMIT ISSUANCE

Based on the foregoing findings with respect to the proposed action, approval of the 2019 ICP as a mechanism to authorize incidental taking of ABB is recommended.

Kenneth Collier, Acting for

Jonna Polk, Field Supervisor  
Oklahoma Ecological Services Field Office

May 15, 2019  
Date

**Acting** [Signature]

Assistant Regional Director – Ecological Services  
Southwest Region

5/24/11  
Date